

**NO. 43709-1--II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JASON C. SCHEIBEL,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**Rules**

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## **I. ISSUES**

1. In a prosecution for Felony Harassment, is it harmless error when the court's bifurcated instructions to the jury omitted an element of the crime charged?
2. In a prosecution for Felony Harassment, did the trial court properly allow the victim to testify that he was aware of the Appellant's past as evidence of "a reasonable belief the threat would be carried out?"

## **II. SHORT ANSWERS**

1. Yes, an erroneous jury instruction that omits an element of the charged offense is harmless error when the uncontroverted evidence necessarily leads to a finding of guilt.
2. Yes, the trial court performed the necessary ER 404(b) balancing test prior to allowing the victim to testify.

## **III. FACTS**

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to specific facts in the record regarding the issues before the Court.

## **IV. ARGUMENTS**

### **1. THE INSTRUCTIONAL ERROR WAS HARMLESS.**

Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and they properly inform the jury of applicable law when read as a whole. *State v.*

*Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The failure to instruct on an element of an offense is reversible error. *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). An erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 330 (1990); *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002); *State v. Jennings*, 111 Wn. App. 54, 64, 44 P.3d 1 (2002). The error is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilty. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

The State agrees with the Appellant that under *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005), the bifurcated instructions in the present matter were in error. The Appellant, however, is not correct in simply asserting that this matter is identical to the *Mills* case. In *Mills*, the defendant damaged the victim's car and left the victim phone messages threatening to kill her and slit her neck. *Mills*, 154 Wn.2d at 5. At trial, the victim testified that she "became 'very scared' after the phone call and after subsequently learning of Mills' criminal history 'thought all the more [Mills] would carry out what she said she would do.'" *Id.* The Court reversed the conviction, finding that the error in the bifurcated instructions was not harmless:

Although it is clear from the record that Mills made a threat to kill, we cannot say beyond a reasonable doubt that the jury would find the victim was placed in reasonable fear of being killed. Therefore, the error here is not harmless.

*Id.* at 15.

In the present matter, the uncontroverted evidence necessarily leads to a finding of guilt; therefore, the instruction error was harmless. Mr. Buchan testified that although he was not concerned with the Appellant threats immediately, he became fearful for his life after the Appellant continued making threats. The Appellant first threatened Mr. Buchan over the phone, telling him that he would break Mr. Buchan in half. 1RP 47. The Appellant repeatedly called Mr. Buchan and left him two voicemails. 1RP 49. After that initial contact, the Appellant continuously texted and called Mr. Buchan; however, Mr. Buchan would simply not respond. 1RP 54.

A few days later, at the request of Ms. Gunter, Mr. Buchan served the Appellant with an anti-harassment order at the Appellant's place of employment. 1RP 54. As Mr. Buchan was leaving, the Appellant followed him outside. 1RP 55. The Appellant recognized Mr. Buchan as the man who was preventing him from contacting Ms. Gunter. 1RP 55. The Appellant reminded Mr. Buchan of the voicemails he had left on his phone and that he was not kidding. 1RP 55.

Mr. Buchan then decided to listen to the Appellant's voicemails. The Appellant directs numerous death threats towards Mr. Buchan: "I will break you in fucking two dude;" "You're a dead man. You know what, you're a dead man;" "I'll snap you like a piece of (inaudible);" "I will break you in fucking two;" "Any time, any place, anywhere. You fuck with my ex-woman, you fuck death." 2RP 140-41. Upon hearing these statements, Mr. Buchan became concerned that the Appellant would carry out his threats to kill. 1 RP 56. Mr. Buchan looked into the Appellant background and concluded that the Appellant was "capable of doing whatever he really wanted to do." 1RP 67. Mr. Buchan continued to deflect the Appellant's attention away from Ms. Gunter, but still remained in fear of the Appellant's threat: "I figured I had a better chance." 1RP 69.

The above facts are uncontroverted. The jury heard Mr. Buchan describe the threats the Appellant made towards him. They heard Mr. Buchan state unequivocally that based upon the Appellant's words and conduct towards him and Ms. Gunter, he was worried the Appellant would carry out his threats to kill. The jury further heard the voicemails the Appellant left on Mr. Buchan phone.

The above facts portray an incident that lasts multiple days, with numerous threats made directly over the phone, on voicemails, through text messages, and in person. Mr. Buchan clearly stated that he was

concerned for his life. Mr. Buchan's actions clearly support his testimony. Despite his own fears, he deflected the Appellant's attention away from Ms. Gunter, thereby protecting her. He did a background check on the Appellant, which furthered his fears. The uncontroverted evidence clearly supports a finding beyond a reasonable doubt that Mr. Buchan was in reasonable fear that the Appellant would carry out his death threats. Therefore, the instructional error was harmless.

**2. THE TRIAL COURT CONDUCTED AN ER 404(B) ANALYSIS PRIOR TO ALLOWING MR. BUCHAN TO TESTIFY AS TO HIS KNOWLEDGE OF THE APPELLANT'S PAST CONDUCT, THEREBY SUPPORTING HIS REASONABLE BELIEF THE APPELLANT WOULD KILL HIM.**

A trial court's decision to admit ER 404(b) evidence is reviewed for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion where it fails to abide by the rule's requirements. *Id.* To admit evidence of a person's prior misconduct, the trial court must

“(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.”

*State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012)(quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The trial court

must conduct this analysis on the record. *State v. Sublett*, 156 Wn. App. 160, 195, 231 P.3d 231 (2010).

In a prosecution for felony harassment, the State must prove that a defendant made a death threat and the person threatened was placed in reasonable fear that the death threat would be carried out. RCW 9A.46.020(1) & RCW 9A.46.020 (2)(b)(ii). The fact finder is asked to objectively determine if the victim's fears that the threat to kill will be carried out is reasonable. *State v. Ragin*, 94 Wn. App. 407, 411-412, 972 P.2d 519 (1999). Consequently, the court has allowed victims to testify to their knowledge of previous acts done by a defendant to support that reasonable fear. See *State v. Barragan*, 102 Wn. App. 754, 9 P.3d 942 (2000); *Ragin*, 94 Wn. App. at 411-412.

Here, the State sought to admit testimony from Mr. Buchan that went towards his reasonable fear of the Appellant's threats. Specifically, Mr. Buchan had done a criminal history check on the Appellant and located numerous felony convictions, including burglary – which, according to Mr. Buchan, shows that the Appellant was a person who would break into someone's house. 1RP 61. The trial court proceeded to conduct its analysis under ER 404(b).

The court initially denied the admission of the evidence, concluding that the prejudicial effects outweighed the probative value.

1RP 64. While doing so, the court identified the purpose of the evidence sought to be introduced – the basis for Mr. Buchan’s fear. 1RP 64. Upon further argument, the court allowed the State to introduce a limited form of this evidence since it went to an element of the crime charged – the reasonableness of the victim’s fear. 1RP 65. The Appellant’s counsel sought permission to cross-examine Mr. Buchan about what information he found. 1RP 66. Furthermore, during cross-examination, the Appellant’s counsel went through a lengthy back-and-forth with Mr. Buchan about the source of his information, none of which was offered by the State. 1RP 77-86.

Therefore, the Appellant’s assertion that the court failed to conduct an ER 404(b) analysis is simply wrong. The court considered all of the necessary factors and properly allowed the State to introduce a limited amount of testimony to further explain Mr. Buchan’s fear. The Appellant’s counsel chose to dwell deeper into the Appellant’s past.


## **V. CONCLUSION**

Appellant’s alleged errors are without basis in law or fact. The instructional error was harmless. The trial court properly allowed the

witness to testify to his knowledge of the Appellant's past as evidence supporting his reasonable belief in the truth of the threats. As these claims are without merit, the Court should dismiss this appeal.

Respectfully submitted this 17<sup>th</sup> day of April, 2013.

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**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 17<sup>th</sup>, 2013.

  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**April 17, 2013 - 1:39 PM**

## Transmittal Letter

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### Comments:

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